

## **6 Official Opinions of the Compliance Board 196 (2009)**

***Notice – Content – Agenda for closed session not required***

***Notice – Method – Posting in glass case outside town hall satisfied Act***

***Closed Session Procedures – Written Statement – Document failed to satisfy other documentation requirements relating to closed session***

December 7, 2009

*Honorable Ed DeSaussure*

The Open Meetings Compliance Board has considered your complaint that the Mayor and Common Council of the Town of University Park violated the Open Meetings Act in connection with a closed meeting held by the Council on March 23, 2009.<sup>1</sup>

For the reasons explained below, we find that the Council violated the Open Meetings Act when it failed to properly document the closed session held March 23, 2009. No minutes were produced and the Council failed to accurately report on the topics of discussion subsequent to the session. The procedures followed by the Council blurred the distinct requirements of the Act with respect to reporting on a closed meeting. We find no violation as to the Act's notice requirements. Given the conflicting viewpoints and limited record, we are unable to reach a decision as to whether the scope of discussions during the closed session was properly confined.<sup>2</sup>

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<sup>1</sup>The Town's Common Council consists of seven members and the Mayor. Charter of the Town of University Park, §301, 8 *Municipal Charters of Maryland* ch. 145. Throughout this opinion, we simply refer to the Council for brevity.

<sup>2</sup>In submitting the complaints to the Council, we had advised that the Council was not expected to address allegations unrelated to the Open Meetings Act. The Compliance Board has no jurisdiction to interpret statutes other than the Open Meetings Act. *See 5 OMCB Opinions* 1 n. 2 (2006).

## I

## Public Notice

*A. Complaint and Response*

The complaint alleged that the Council failed to provide proper advance notice of a meeting held on March 23, 2009. In the complainant's view, notice of a meeting "must disclose the topic of discussion in order to allow the public to assess whether the [Council] is following the law." Furthermore, according to the complaint, the Council "gave no advance written notice as ... required by [§10-506]." (emphasis in original)<sup>3</sup>

The complaint further alleged that, subsequent to the meeting, the Council posted on its website notice of the meeting that "misstated the true purpose and subject matter of the [m]eeting." By giving an "insufficient and misleading justification" for the closed session, in the complainant's view, the Council violated the Act. According to the complaint, the notice indicated that the purpose of the closed session was to "discuss personnel matters," when, in fact, "[n]o personnel matters were discussed..."

In a timely response on behalf of the Council, Suellen M. Ferguson, Esquire, provided affidavits of Amy Headley, the Clerk for the Town of University Park, as well as John Rogard Tabori, Mayor. Both affidavits acknowledged the desire for a closed meeting involving the Town's participation in the State Retirement and Pension System. Both affidavits said that the date and time for the March 23 meeting was finalized on Friday, March 20, 2009. According to Ms. Headley's affidavit, she posted notice of the meeting on the same date that the meeting time was confirmed in a glass case used for posting such notices located outside the door of Town Hall. Ms. Headley acknowledged that other means of giving notice are sometimes used, but to her knowledge, "the official and required place for the posting of [meeting] notices is in the glass case ..." Ms. Ferguson indicated that this location has been used since 1985. A copy of the notice was provided with the response. That document referred to an executive session "to discuss personnel matters." However, as indicated in the Mayor's affidavit, the purpose was also to consult with the municipal attorney. However, the response pointed out that the Act does not require that the notice of a meeting reveal the reasons that a meeting might be closed.

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<sup>3</sup>All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

As to the notice posted subsequent to the meeting, the response acknowledged that the online posting occurred April 13, 2009. According to the response, the posting “was clearly not for purposes of prior notice.” However, the town’s practice is to post on its website agendas for meetings that have occurred. The document posted was modified to add “consult with attorney” to reflect the “eventual reasons for closing the meeting.” However, in the Council’s view, because the Act does not address the posting of an agenda, no violation occurred.

### ***B. Analysis***

Before a public body conducts a meeting governed by the Open Meetings Act, “reasonable advance notice” must be provided to the public. §10-506(a). Generally, notice is to be in writing; it must include the date, time, and place of the session and, if appropriate, a statement that part or all of the meeting may be conducted in closed session. §10-506(b). However, a public body is not required to include an agenda as part of the notice. As we previously opined, “[a]lthough many public bodies routinely provide an anticipated agenda for the benefit of the public, a practice we consider commendable, the failure to do so, or a deviation from an agenda, is simply not a violation [of the Act.]” 4 *OMCB Opinions* 168, 172 (2005). There is no requirement that the notice reflect the purpose of a closed meeting. Thus, even if that information was provided, a variation from the stated purpose could not violate the Act.

The notice posted outside Town Hall on March 20, 2009, the same date that the time of the March 23 meeting was confirmed, clearly satisfied the notice requirements of the Act. Because the Act does not address the availability of an agenda, the subsequent posting of the modified document under a link captioned “Council Meeting Agendas” raises no issue under the Act.

## **II**

### **Record of Closed Session**

#### ***A. Complaint and Response***

The complaint alleged that “there was no recorded public resolution giving the reasons and bases for closing the [m]eeting.” (emphasis in original) The complaint noted that a statement “reflecting both the purpose of the closed session and the topics of discussion” is required. According to the complaint, “[n]o such statement was prepared prior to the meeting or made available to the public.”

The complaint further alleged that, after the closed session, the Council “failed to produce a timely and proper public record, with a statement reflecting both the purpose of the closed session and the topics of discussion.” (emphasis in original) According to the complaint, the record “should have been presented at the [Council’s] March 30, 2009 meeting, its next open meeting.” The complaint argued that “the ‘minutes’ form, approved ... May 18, 2009, provided no meaningful explanation beyond the applicable statutory provisions that justify closure.”

The response indicated that it was not clear upon what provision of the Act the complainant was relying. “There is no legal requirement that a statement or public resolution ... be made available prior to a meeting.” However, the response did acknowledge that, under §10-508(d), a public body is required to vote to close a meeting and that the presiding officer is required to produce, at the time of closing the meeting, a written statement of the reasons for closure, including a citation to the applicable authority, and a list of topics to be discussed. As to the March 23 session, the response stated that the only people present were the Mayor, council, and attorney. The vote to support closure was unanimous.

The response described the process employed by the Council in connection with closed meetings. A form titled “Record of Executive Session” is used, a copy of which was provided in a supplemental letter from the complainant. According to the response, when the Council convened to vote on closure on March 23, the Mayor “made a written record of who was present, the time, the reasons for the closing (consult with attorney, discuss person specific personnel issues)[,] the topics to be discussed (personnel issues related to pension, legal advice with respect to pension) and the vote to close.” Immediately following the meeting, the Mayor transferred this information to a “Record of Executive Session” form and completed it. The information concerning the vote to open and close were typed in the next day.

As a result of an oversight, the Record of Executive Session was not brought to the April 20 meeting to be appended to the minutes of the March 30 minutes. The closed session minutes were provided at the next meeting. The Mayor’s affidavit makes clear this form serves not only as a “closing form,” but also as the minutes of the closed session.

**B. Analysis**

The Open Meetings Act requires three distinct records in connection with a closed session. Before a public body goes into a closed session, the presiding officer must complete a written statement of the reason for closing the meeting, citing the relevant authority under §10-508(a), and listing topics to be discussed. §10-508(d)(2)(ii).<sup>4</sup> Although we were not provided with a copy of the presiding officer's original notes recorded at the time the meeting was closed, it appears that the information was adequately captured, consistent with his understanding of the purpose at that time. This statement is a matter of public record, §10-508(d)(4), reflecting the facts in advance of the closed session.

A public body must also keep minutes of a closed session, reflecting, among other information, each item considered. §10-509(b) and (c)(1). Each item ought to be described in sufficient detail to enable the reader to gain an appreciation of the issue under discussion. In 6 *OMCB Opinions* 164, 169 (2009), we addressed the level of detail expected in minutes of a public meeting. While it is true that minutes of a closed meeting ordinarily are not available to the public, closed session minutes are available to the Compliance Board. §10-502.5(c)(2)(ii).<sup>5</sup> In our view, the minimal information reflected in the "record of executive session" did not qualify as minutes as contemplated by the Act.

Subsequent to a closed session, a public body must include as part of its publicly available minutes a summary of the closed session reflecting each item listed in §10-509(c)(2). Although the information recorded in the written statement produced in advance of a closed session and the subsequent disclosure are similar, they are not identical, and both records must be kept. Given the Council's admission that, after the closed session convened, no personnel matters were discussed, the "list of topics discussed" was in fact inaccurate, thus, resulting in a violation of the Act. However, given the Council's explanation why the document was not available on April 20, we decline to find a violation in connection with the delay in the Council's adoption as part of minutes. *Cf.* 2 *OMCB Opinions* 92, 94 (1999) (while

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<sup>4</sup>In order to close the session, there also must be a motion and vote in support of closure. §10-508(d)(1). However, no "public resolution" is required. *See, e.g.*, 5 *OMCB Opinions* 165, 168 (2007) ("bare-bones motion suffices").

<sup>5</sup>If the public body considers the minutes of a closed session sealed, the Compliance Board is required to maintain the document in confidence. §10-502.5(c)(2)(iii).

minutes must be prepared in reasonably timely manner, practical considerations may justify some delay).

In summary, the Council's practice of combining the Act's advance and subsequent reporting requirements in connection with a closed meeting into a single document and also treating that document as "minutes" blurred the distinct reporting requirements envisioned in the Act.

### **III**

#### **Closed Session Discussions**

##### ***A. Complaint and Response***

The complaint alleged that no personnel matters were considered during the closed session on March 23. Furthermore, according to the complaint, the Council used the occasion to "'deliberate on its position' on a public policy matter and to plan future legislative acts." (emphasis in original)

The response acknowledged that, once the closed session convened, it became apparent that there was no interest in discussing individual employees, notwithstanding the impression of the Mayor at the time the meeting was closed. However, according to the response, the remainder of discussion was limited to opinions of the Council's municipal attorney and a request for additional advice.

##### ***B. Analysis***

Given the Mayor's impression that members of the Council desired to address the status of specific employees when the meeting was closed, we do not find a violation based on the fact such discussions did not materialize. However, as to the scope of discussions, we have differing opinions by two individuals who were both present in the room. Given the limited record of the closed meeting available to us and the contrasting views offered, we decline to reach the merits as to this allegation. *See* §10-502.5(f)(2) (opinion may state that Compliance Board unable to resolve complaint).

**IV**

**Conclusion**

We find that the Council violated the Open Meetings Act when it failed to properly document the closed session held March 23, 2009. No minutes of the closed session were produced and the Council failed to accurately report on the topics of discussion subsequent to the session. Its procedures blurred the distinct requirements of the Act with respect to reporting on a closed meeting. We find no violation as to the Act's notice requirements. Given the conflicting viewpoints and limited record, we are unable to reach a decision as to whether the scope of discussions during the closed session was properly confined.

OPEN MEETINGS COMPLIANCE BOARD

*Elizabeth L. Nilson, Esquire*  
*Courtney J. McKeldin*  
*Julio Morales, Esquire*